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IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

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COURT OF CRIMINAL APPEALS
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THE STATE OF TEXAS **APPELLANT**

V.

DANIEL VILLEGAS **APPELLEE**

THE STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-15-00002-CR

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TRIAL COURT: 409th District Court, Judge Sam Medrano, presiding, and 41st District Court, Judge Mary Anne Bramblett (retired)

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Ann Crawford McClure, Justice Yvonne T. Rodriguez, and Justice Steven L. Hughes

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STATEMENT OF THE CASE

Daniel Villegas, appellee, was indicted in 1994, and certified to stand trial as an adult, for the capital murder of Robert England and Armando Lazo. (CR1:6-7, 48-49, 201).[1] Villegas's first trial in 1994 resulted in a hung jury (11-1 in favor of conviction) and a mistrial, (CR1:47, 95); (CR20:157), and he was subsequently convicted of capital murder and received a life sentence after his retrial in 1995. (CR1:38-40, 116, 118-20); (CR4:1223, 1225). Villegas's capital-murder conviction was affirmed on direct appeal. (CR10:3541-46); *see also Villegas v. State*, No. 08-95-00272-CR (Tex.App.–El Paso, July 10, 1997, no pet.) (not designated for publication).

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[1] Throughout this brief, references to the record will be made as follows: references to the twenty-two-volume clerk's record will be made as "CR" and volume and page number, references to the ten-volume reporter's record will be made as "RR" and volume and page number, and references to exhibits will be made as either "SX" or "DX" and exhibit number. References to specific jail-recorded telephone conversations will be made by providing the date of the conversation (mm/dd/yy), any specific numerical label assigned by the correctional institution, and the approximate timestamps for the beginning and end of the relevant portions of the conversation.

Additionally, with the exception of one El Paso County Jail ("EPCJ") recording that took place on September 9, 2013, the timestamp citations provided for the EPCJ recordings are the timestamps reflected when using Windows Media Player. The timestamp citations provided for the Texas Department of Criminal Justice ("TDCJ") recordings are those reflected when using the Securus Secure Call Platform (SCP) player contained on the same CD as the TDCJ recordings. In order for the timer/timestamp functionality to be properly displayed in the SCP player, the compatibility mode for the Internet Explorer web browser must be adjusted to that of its eighth version or earlier.

Villegas then waited approximately 14 years to file his first article 11.07 application for post-conviction writ of habeas corpus, alleging ineffective assistance of counsel and actual innocence. (CR4:1227-373); (CR11:3607-763); (CR12:4107-337). At the conclusion of evidentiary hearings, the Honorable Judge Sam Medrano found that Villegas conclusively demonstrated actual innocence, as well as ineffective assistance of counsel, criticized the State for allegedly committing "numerous and inexcusable mistakes and omissions" that "...have harmed Villegas over the last nineteen years,"[2] and recommended granting habeas relief. (CR13:4378-455). The State subsequently filed in this Court objections to a considerable portion of the trial court's findings as not constituting actual findings of historical facts or as being wholly unsupported by the record.[3] This Court, after conducting its own independent review of the habeas record,

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[2] Based on this unnecessary, harsh, and unsubstantiated accusation against the State, implying that the State prosecuted someone he (Judge Medrano) believes is innocent, and further based on the State's intent to admit jail-recorded telephone conversations referring to certain behind-the-scene actions related to Judge Medrano, for the very limited purpose of showing that Villegas conspired with agent/co-conspirator John Mimbela to improperly influence the judicial process, the State has twice unsuccessfully moved to recuse Judge Medrano. (CR21:7400-87, 7501). Judge Stephen B. Ables, the Presiding Judge of the Sixth Administrative Judicial Region who presided over both recusal motions, determined that the proper resolution of any perceived bias was not to recuse Judge Medrano, but to suppress and seal those recordings. (CR22:7788-89); (RR6:6-7); (RR8:8-11, 20-21, 24-27, 39-40, 49, 54).

[3] Because the State's objections were filed directly with this Court, they are not part of the clerk's record prepared by the El Paso County District Clerk's Office. *See* (objections and supplemental objections filed in this Court on December 3, 2012, and January 10, 2013).

determined that Villegas received ineffective assistance of counsel, but failed to show actual innocence, and remanded the case for a new trial. (CR21:7390-94, 7509-15); *see also Ex parte Villegas*, 415 S.W.3d 885, 886-87 (Tex.Crim.App. 2013).

At a subsequent pretrial hearing on a "Motion to Determine the Relevance of Recorded Conversations"[4] held on January 5, 2015, Judge Medrano determined that all but one of the State's designated jail recordings would be excluded at trial because they are irrelevant and unfairly prejudicial under rule 403 of the Rules of Evidence, (RR9:24, 37, 46, 53, 66, 72, 78, 89, 94, 97), and, on that same date, signed a written order excluding the statements made on the 37 jail-recorded telephone conversations that are at issue in this appeal. (CR22:7833-35). The State timely perfected appeal of the trial court's pretrial order excluding the admission of the jail recordings. (CR22:7842-44).

During the pendency of the State's appeal, the Eighth Court of Appeals denied Villegas's motion to dismiss the State's appeal, *see State v. Villegas*, 460 S.W.3d 168, 170 (Tex.App.–El Paso 2015) (op. on motion), and granted the State's motion to enforce the Eighth Court's stay order, which Judge Medrano had violated by signing an order sealing the jail recordings that are the subject of this

[4] No such motion was ever filed by Villegas or served upon the State.

State's appeal. *See State v. Villegas*, No. 08-15-00002-CR, 2015 WL 1477748 at *2 (Tex.App.–El Paso, Mar. 23, 2015) (op. on motion) (not designated for publication).

On December 21, 2016, in a published opinion, the Eighth Court affirmed the trial court's pretrial order excluding, as irrelevant and unfairly prejudicial, the statements made in the 37 jail-recorded telephone conversations. Specifically, the Eighth Court overruled the State's first issue presented for review and held, among other things, that, under the circumstances of this case, the trial court did not err in requiring the State to make a pretrial demonstration that the recordings are relevant, not unfairly prejudicial under a rule 403 balancing test, and not inadmissible hearsay. *See State v. Villegas*, 506 S.W.3d 717, 730-34 (Tex.App.–El Paso 2016, pet. granted). The Eighth Court also overruled the State's second through ninth issues presented for review, holding that the State failed its burden of proving, in this pretrial hearing, that the statements contained on the jail recordings are relevant, not unfairly prejudicial under a rule 403 balancing test, and not inadmissible hearsay. *See id*. at 735-67. No motion for rehearing was filed by the State.

On January 20, 2017, the State timely filed its petition for discretionary review (PDR), which this Court granted on the following two grounds: (1) "The

Eighth Court erred in holding that the trial court did not abuse its discretion in requiring, and placing the burden upon, the State to establish that jail-recorded telephone conversations Villegas seeks to exclude pretrial are: (1) relevant to an elemental or evidentiary fact of consequence to be litigated at trial, (2) not unfairly prejudicial under rule 403, and (3) not inadmissible hearsay, where such determinations necessarily require the ever-changing context of a trial and the party claiming the protection of exclusionary rules of evidence bears the burden of proving his case in a pretrial motion;" and (2) "The Eighth Court misapplied the standard for reviewing relevance determinations where its analysis for determining whether the trial court abused its discretion in *excluding* relevant evidence looked to whether, based on the trial court's personal evaluation of competing or available inferences, it is *reasonable to reject* the State's proffered inferences, when the proper standard looks to whether an appellate court can state with confidence that by no reasonable perception of common experience could it be determined that the proffered inference is one that is *reasonably available* from the evidence." By order of this Court, oral argument will not be permitted.

GROUNDS FOR REVIEW

GROUND FOR REVIEW ONE: The Eighth Court erred in holding that the trial court did not abuse its discretion in requiring, and placing the burden upon, the State to establish that jail-recorded telephone conversations Villegas seeks to exclude pretrial are: (1) relevant to an elemental or evidentiary fact of consequence to be litigated at trial, (2) not unfairly prejudicial under rule 403, and (3) not inadmissible hearsay, where such determinations necessarily require the ever-changing context of a trial and the party claiming the protection of exclusionary rules of evidence bears the burden of proving his case in a pretrial motion.

GROUND FOR REVIEW TWO: The Eighth Court misapplied the standard for reviewing relevance determinations where its analysis for determining whether the trial court abused its discretion in *excluding* relevant evidence looked to whether, based on the trial court's personal evaluation of competing or available inferences, it is *reasonable to reject* the State's proffered inferences, when the proper standard looks to whether an appellate court can state with confidence that by no reasonable perception of common experience could it be determined that the proffered inference is one that is *reasonably available* from the evidence.

STATEMENT OF FACTS

Shortly after midnight on April 10, 1993, seventeen-year-old Armando Lazo and eighteen-year-old Robert England were gunned down while walking down Electric Street in Northeast El Paso. (CR3:731, 770); (CR5:1533-34, 1558-59, 1640, 1645). Their companions, Jesse Hernandez and Juan Medina, survived by fleeing the scene. (CR3:731-32, 770-71); (CR5:1535-39, 1559-62). England was found dead in a nearby field from a bullet wound to his head, and Lazo, found unconscious on a nearby porch, later died from an abdominal gunshot wound. (CR3:699-700, 710-12, 720-21); (CR4:1014); (CR5:1568-70, 1575, 1579-80, 1705-06, 1708-12, 1715). Many individuals looking to earn respect on the streets bragged about committing the murders, but were ruled out as suspects because they did not know the actual details of the crime. (CR4:1016-18, 1065-72, 1134-38); (CR6:1804-05, 1835-36, 1839-42, 1845-47, 1891-93, 1898-99).

Villegas, a Varrio Northeast (VNE) gang member, became a suspect after Villegas's cousin, David Rangel, gave a statement to police on April 21, 1993, stating that Villegas, in a telephone conversation on April 14, 1993, admitted to murdering Lazo and England and gave details Villegas related to him that were largely consistent with the details of the crime. (CR3:865-67, 869, 940); (CR4:1018-19, 1035-36, 1045-53); (CR5:1667, 1676-77, 1692-93, 1695);

(CR6:1806-08, 1992-93); (CR7 at 2207, 2342-43, 2349). On that same date, April 21, 1993, Rodney Williams, identified at that point as a possible witness, also gave a statement to police implicating Villegas as the shooter. (CR3:929, 935); (CR4:1019-21, 1120-21); (CR6:1736-37, 1743-46, 1750-57); (CR7:2022, 2027). Based on Rangel's and Williams' statements, El Paso Police Department (EPPD) detectives, during the late-night hours of April 21, 1993, located and took Villegas and Marcos Gonzalez, a fellow VNE gang member and also a suspect, into custody. (CR3:947-48); (CR4:1021-22, 1026); (CR6:1808-11, 1935-36).

Shortly thereafter, during the early-morning hours of April 22, 1993, Villegas confessed that, while sitting in the back-passenger-side seat of a "white mid-size car" with Gonzalez, Williams, Fernando Lujan, and Enrique Ramirez (or Rodriguez), he (Villegas) shot and killed both England and Lazo during a drive-by shooting at approximately 12:15 a.m. (CR3:953-54); (CR4:1032-33, 1041, 1097-100, 1111-12); (CR6:1847, 1872, 1894-97, 1907-10, 1944); (CR7:2356); (CR10:2423-27). At approximately the same time that Villegas confessed to EPPD detectives at a juvenile facility, Gonzalez gave police at the central police station–a different location than the juvenile facility–two statements, one of which implicated Villegas as the shooter. (CR3:948, 950); (CR4:975-77, 1033, 1037-38,

1100, 1116, 1124, 1128-30); (CR6:1809-12, 1818, 1823, 1863, 1936, 1939, 1948-49, 1951); (CR7:2029-30, 2035); (CR10:3425); (CR13:4538).

Before the Honorable Mary Anne Bramblett, then-presiding Judge of the 41st District Court, Villegas unsuccessfully attempted to suppress his confession on the grounds that, among other things, EPPD Detective Alfonso Marquez coerced his confession, (CR1:92, 530), and his (Villegas's) unwise strategy of fabricating a story that Det. Marquez destroyed his first "truthful" statement that Williams had left with "...some black guys..." and committed the murders nearly implicated Villegas as having, at the very least, knowledge of Williams's involvement in the murders, if not his own. (CR2:468-87, 490-93).[5]

And Villegas's first trial in 1994, also before Judge Bramblett, resulted in a mistrial, with 11-1 in favor of conviction, (CR1:47, 95); (CR20:157),[6] notwithstanding that Villegas, in his trial testimony, admitted telling Rangel that he committed the murders, (CR7:2344-45), his trial testimony was riddled with

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[5] Judge Medrano, already having unnecessarily deemed Villegas's confession coerced during the habeas proceedings, (CR22:7593, 7601), has since suppressed Villegas's confession, which the State would not have been able to successfully appeal because Judge Medrano's express adverse credibility findings on the issue of coercion, which the law affords almost total deference by a reviewing court, insulated his ruling from reversal on any State's appeal. *State v. Alderete*, 314 S.W.3d 469, 472 (Tex.App.–El Paso 2010, pet. ref'd).

[6] Villegas's counsel on retrial, Attorney John Gates, attested during Villegas's habeas proceedings that Villegas received a "freak" mistrial for reasons unrelated to his guilt. (CR10:3458).

inconsistent and implausible details, (CR7:2324-29, 2373-75, 2376-78, 2388), and he presented the jury with two inconsistent alibis, specifically, that: (1) while at an apartment where a friend was babysitting, he, Williams, and Gonzalez watched movies, (CR6:1976-83); (CR7:2255-61, 2266-70, 2305-07, 2311-20, 2322), and (2) he, Williams, and Gonzalez were at Boomerangs Theater with Villegas's then-girlfriend's parents, watching "Malcolm X." (CR7:2293-97, 2325-26).[7]

After this Court granted Villegas habeas relief, and during the State's preparation for retrial, the State's suspicion that something untoward was going on behind the scenes, (CR16:5947-48), was confirmed when it learned from the jail recordings at issue in this appeal, as set forth below, that Villegas and Mimbela, a local businessman and stepfather to Villegas's nieces, had conspired to confer financial benefits on no less than seven witnesses in an attempt to improperly influence their testimony, manufacture favorable evidence, or suppress

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[7] After he gave his confession, Villegas told a probation officer that he was at "Negro's" house at the time of the murders, such that Villegas has given at least three inconsistent alibi stories. (CR19:6696); (RR4:29).

And Villegas and Williams also repeatedly lied about their whereabouts during the early morning hours after the shooting, claiming that all three of them had not been together, (CR6:1734, 1758, 1763, 1767-68, 1791, 1931-33); (CR7:2376-77, 2388), but in light of evidence showing that they had reported an alleged drive-by shooting at 3:00 a.m., which the State contends was staged in an attempt to create an alibi, (CR4:1007-12, 1075); (CR6:1984-85, 1988-94); (CR7:2082-85), Villegas and Williams finally admitted that they had all been together at 3:00 a.m. after the murders. (CR14:5000-01, 5026); (CR16:5871-72, 5874).

unfavorable evidence, which reflects Villegas's consciousness of guilt.[8]

Admissions of guilt and statements from which guilt can be inferred

In a telephone conversation recorded by EPCJ on October 12, 2011 (designated as State's issue 2B in its brief before the Eighth Court), which was first transcribed by a certified court reporter and used by the State at Villegas's habeas proceedings, Villegas told his mother, Yolanda, that he was tired of begging God to release him from confinement, "even though I'm not innocent." (CR19:6973–certified transcription by Certified Court Reporter Maria Chavez); (CR22:7714–10/12/11 conversation (224159935647755) at 16:41–17:18); (CR22:7737); (RR9:81-82); *Villegas*, 506 S.W.3d at 740-41.[9] At the habeas proceedings, Villegas offered an alternative interpretation of this statement, (CR16:6149), but later changed his story after obtaining a competing translation upon which he could deny making the statement. (CR17:6197, 6204-08); (CR19:6845-55).

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[8] For brevity's sake and because the Eighth Court set forth the relevant excerpts identified by the State in its opinion, the State will paraphrase the conversations and reference any specific wording only when necessary.

[9] The Eighth Court's characterization of the State's transcription of this recording as "self-made" is not correct, *Villegas*, 506 S.W.3d at 740, as this excerpt was transcribed by a certified court reporter. (CR19:6973-74).

But in conversations recorded by EPCJ on November 10, November 22, and November 27, 2011 (designated as State's issues 2C, 2D, and 2E, respectively), Villegas, in speaking with a "Jenny," Mimbela, and his (Villegas') sister, tried to explain what he meant when he told his mother he was not innocent, and, when Mimbela coached him on what to tell the media about his statement that he was not innocent, not once did Villegas deny making the statement. (CR22:7714–11/10/11 conversation (226726575839243) at 17:25–18:25, 11/22/11 conversation (227788625587211) at 6:50–7:33, 7:46–8:20, 11/27/11 conversation (228242111768587) at 10:31–10:50); (RR9:83); *Villegas*, 506 S.W.3d at 741-43.

In another conversation recorded by EPCJ on March 14, 2011 (designated as State's issue 2A), Villegas told his mother that he would be unable to obtain habeas relief on the basis of actual innocence because "...we don't got that." (CR19:6925); (CR22:7714–03/14/11 conversation (205418085845002) at 44:13–44:25); (CR22:7737); (RR9:78-79); *Villegas*, 506 S.W.3d at 737-38. And in an EPCJ conversation recorded on January 15, 2013 (designated as State's issue 2F), Villegas indicated that he told inmates who complained about jail that they would not be there if they had not committed a crime. (CR22:7714–01/15/13

conversation (264958890776587) at 23:27–24:00); (CR22:7737); (RR9:93); *Villegas*, 506 S.W.3d at 743.

Wayne Williams

In telephone conversations recorded by TDCJ on July 6, July 13, July 22, and July 27, 2009 (designated as State's issues 3A through 3D), and recorded by EPCJ on May 10 and June 20, 2011 (designated as State's issues 3E and 3F), Villegas spoke with Mimbela, in which: (1) they discussed their efforts to locate an individual named Wayne Williams (hereinafter "Wayne"), with Villegas providing Mimbela guidance and information on how to locate him, and (2) Mimbela, after learning that Wayne remembered Villegas–not Rudy Flores (Villegas's alleged 15-year-old alternative perpetrator)–confessing to the murders and that Villegas gave Wayne details that were eerily similar to what he (Villegas) told Rangel four days after the murders (and before he was allegedly coerced into confessing to police), told Villegas that he (Mimbela) had set up a job interview for Wayne, even though he had already decided to hire him, to "...have him close," to which Villegas expressed satisfaction and laughed.[10] (CR22:7714–05/10/11

[10] This Court is in the same position as the Eighth Court and the trial court to gauge Villegas's tone and responses to Mimbela's statements. Villegas did not simply respond "generally with 'yes' or 'yeah,'" *Villegas*, 506 S.W.3d at 745, but also actively participated in these conversations, responded emphatically with statements such as, "Hell, yeah," and frequently laughed in satisfaction at Mimbela's efforts on his behalf. *See* (CR22:7722–02/22/10 conversation at 13:18–14:21).

conversation (210453933591563) at 21:30–22:25, 22:54–24:25, 25:04–27:07, 28:16–28:21, 06/20/11 conversation (214069519707147) at 5:17–5:30); (CR22:7722–07/06/09 conversation at 4:46–5:27, 5:45–5:53, 6:10–6:17, 7:11–7:15, 11:30–11:42, 07/13/09 conversation at 5:44–9:42, 07/22/09 conversation at 2:28–2:35, 3:52–3:58, 4:49–5:20, 6:11–6:22, 07/27/09 conversation at 2:00–2:34); *Villegas*, 506 S.W.3d at 750-52.[11]

Surviving eyewitnesses Jesse Hernandez and Juan Medina

In conversations recorded by TDCJ on July 27, 2009, and January 11, July 26, August 7, and September 20, 2010 (designated as State's issues 4A through 4E), Villegas and Mimbela discussed financial benefits Mimbela conferred on Hernandez and Medina, for which Villegas would oftentimes indicate his approval or satisfaction, specifically, Mimbela treated Hernandez to tickets to a Sun Bowl football game and boxing matches, including ringside seats in Los Angeles alongside numerous sports celebrities, and placed Medina on payroll and provided financial assistance for medical expenses. (CR22:7722–07/27/09 conversation at 2:00–2:34, 01/11/10 conversation at 6:11–6:20, 7:47–8:11, 07/26/10 conversation

[11] The State disagrees with the Eighth Court's suggestion that Wayne's prospective testimony has not changed, *Villegas*, 506 S.W.3d at 752, as the record shows that Wayne told prosecutors in 2014 that "...he did not hear [Villegas] brag about committing the murders on Electric St. [Wayne] remembers [Villegas] saying that the detective made him confess," (CR22:7567), in stark contrast to what he originally told Mimbela.

at 1:07–1:19, 7:22–7:48, 08/07/10 conversation at 11:45–12:54, 09/20/10 conversation at 7:27–7:39, 8:48–9:59); (RR9:10); *Villegas*, 506 S.W.3d at 754-56. In a portion of the August 7, 2010, conversation, omitted from the Eighth Court's opinion, Mimbela related to Villegas that he reassured Hernandez that he (Mimbela) was not engaging in any wrongdoing by buying him tickets to different events, and Villegas then laughed with Mimbela. (CR22:7722–08/07/10 conversation at 11:45–12:54).

Hernandez, who had testified relatively consistently for the State at both trials, (CR3:723-49); (CR5:1549-59, 1564-65), and always testified unremarkably that he had given a statement to and assisted police at the time, (CR3:735); (CR5:1559-62), gave a more dramatic accounting of the offense at the habeas proceedings and asserted, for the first time ever, that Det. Marquez had also engaged in coercive tactics with him, (CR4:1295); (CR14:4788-98, 4815-18, 4833-38), though Hernandez acknowledged that he changed his position about Villegas's guilt only after being contacted by Mimbela and Villegas's investigator. (CR14:4826-27, 4830); (CR16:5936-39). Medina, who had also testified relatively consistently at both trials, identifying the suspect vehicle as "goldish" in his statement to police and at trial, (CR3:762-73, 776-78, 780-90); (CR5:1523-39,

1542-53); (CR19:6883), began describing the suspect vehicle as maroon at the habeas proceedings. (CR4:1299).

15-year-old alleged alternative perpetrator Rudy Flores

Villegas obtained habeas relief from this Court based partly on his claim that trial counsel rendered ineffective assistance of counsel by failing to present evidence of an alternative perpetrator, namely, then-fifteen-year-old Rudy Flores who, along with his now-deceased brother, Javier Flores, were members of the Los Midnight Locos (LML) gang and lived in the area. *Ex parte Villegas*, 415 S.W.3d at 886-87; (CR4:1048-49); (CR6:1839-40); (CR15:5410).[12]

In conversations recorded by TDCJ on October 28 and November 1, 2010, and February 2, February 4, February 6 (2 segments) and February 28, 2011 (designated as State's issues 5A through 5G), Villegas spoke with his parents and Mimbela about his and Mimbela's efforts to offer Flores $50,000 in "reward" money to pin the murders on his deceased brother, Javier Flores, and during these conversations, Villegas opined that Flores was likely not the shooter. (CR22:7722–10/28/10 conversation at 8:06–9:48, 11/01/10 conversation at 8:17–9:24, 02/02/11 conversation at 2:20–2:33, 4:10–4:29, 02/04/11 conversation

[12] Based upon Villegas's representation that he would have raised an alternative-perpetrator defense at trial, but for ineffective assistance of counsel, the State has an objectively reasonable belief that Villegas will raise such a defense at trial.

at 2:26–2:31, 3:39–4:40, 02/06/11 conversation at 11:08–11:26, 14:05–14:20, 02/28/11 conversation at 1:54–2:32); *Villegas*, 506 S.W.3d at 757-59.

Arasally Flores and Jose Juarez

In conversations recorded by TDCJ on January 28, February 22, and April 27, 2010 (designated as State's issues 6A through 6C), Mimbela told Villegas that he had twice offered $50,000 in "reward" money to Arasally Flores, who Mimbela stated "...need[ed] the money..." because she lived in a "run-down" house and drove a "beat up" car, and also to Juarez, encouraging the both of them to pin the murders on someone other than Villegas. (CR22:7722–01/28/10 telephone conversation at 9:43–11:03, 11:47–12:16), 02/22/10 conversation at 12:10–12:18, 13:18–14:21, 04/27/10 conversation at 7:05–7:26, 8:28–9:05, 9:37–10:10); *Villegas*, 506 S.W.3d at 759-61.

Rodney Williams

Williams recanted his statement to police and attempted to testify favorably for Villegas at his prior trials, despite being a State's witness, to the point of committing perjury, (CR3:905-33); (CR6:1732-36, 1743-46, 1750-59, 1775-77, 1786, 1789-90, 1796); (CR14:5028-30, 5034-36), but, despite evidence contained in the recordings below suggesting that Williams may have been less than willing

to help Villegas again, Williams testified for Villegas–again inconsistently–at his habeas proceedings. (CR14:4983-85, 4989-90, 5025-28, 5034).[13]

In a conversation recorded by TDCJ on February 25, 2011 (designated as State's issue 7A), a furious Villegas told his mother that he had demanded in a letter to Williams that Williams fulfill an oath he had made to him, complaining that Williams and Gonzalez had been "...living it up..." in the free world, while he (Villegas) had been left behind to "rot[]" in prison and that Williams was "cash[ing] out on him." (CR22:7722–02/25/11 conversation at 1:04–3:05); *Villegas*, 506 S.W.3d at 763.

In another conversation recorded by TDCJ on February 28, 2011 (designated as State's issue 7B), Villegas laughed when his mother told him that Mimbela had burned a "tough-love" letter he had sent to Williams, explaining to her that that type of letter was consistent with his "...philosophy of...get[ting] people from the street to do what you want...." (CR22:7722–02/28/11 conversation at 2:49–3:40); *Villegas*, 506 S.W.3d at 763-64. And in a conversation recorded by EPCJ on December 13, 2011 (designated as State's issue

[13] Gonzalez, who did not participate in Villegas's habeas proceedings, had also recanted his statement to police and attempted to testify favorably for Villegas, despite being a State's witness, (CR3:941-48, 951-61); (CR4:971-97); (CR5:1665-66); (CR6:1925, 1928-32, 1976-83, 1995-96), although his testimony that the detectives only coerced him into signing a statement that he himself wrote had the same effect of implicating Villegas. (CR6:1943-46, 1952-64, 1968-69, 1985, 1993-94).

7C), Mimbela told Villegas that he had treated Williams to a Dallas Cowboys football game. (CR22:7714–12/13/11 conversation (229657062168587) at 21:12–22:30); *Villegas*, 506 S.W.3d at 764.

David Rangel

Although Rangel has maintained that Villegas did in fact tell him that he committed the murders, both Rangel and Villegas have attempted to characterize Villegas's confession as mere joking or bragging. (CR2:408-10); (CR3:748, 791, 874-88, 891); (CR5:1546, 1664-65, 1668-69, 1671-78, 1681-87, 1690-91); (CR14:4887-89, 4891-94, 4900); (CR16:5840).

In conversations recorded by TDCJ on September 13 and September 17 (2 segments), 2010 (designated as State's issues 8A through 8C), Villegas spoke to his mother and Mimbela about Rangel's guilt at having turned Villegas in to the police, and in a conversation recorded by EPCJ on September 9, 2013 (designated as State's issue 8D), Villegas, speaking to his then-girlfriend, expressed fury at Rangel's betrayal. (CR22:7718–09/09/13 conversation at 34:05–34:20);[14] (CR22:7722–09/13/10 conversation at 8:04–8:25, 09/17/10 conversation at

[14] The timestamp for this EPCJ recording, which is the only recording on this CD, is that reflected in the "Player IQ Version 1.0" player provided on the EPCJ CD.

1:00–1:20, 3:33–3:50); *Villegas*, 506 S.W.3d at 762.[15]

Improperly influencing judicial officers

In conversations recorded by TDCJ on February 8 and February 22, 2010 (designated as State's issues 9A and 9B), Mimbela and Villegas discussed how to indirectly contact Judge Bramblett, because direct contact would look "...like we are trying to influence her" or "buy" or "bribe" her, by giving portions of Villegas's writ application and a letter from a local Congressman to Judge Bramblett's husband, and Villegas indicated his agreement with this plan by exclaiming, "Hell, yeah...sounds good." (CR22:7722–02/08/10 conversation at 8:15–10:08, 02/22/10 conversation at 5:39–9:04); *Villegas*, 506 S.W.3d at 764-65).

On February 25, 2010, three days after the February 22, 2010, conversation, Judge Bramblett voluntarily recused herself because she "received information" that created a perceived inability to preside over Villegas's habeas application. (CR10:3467). In a conversation recorded by TDCJ on May 3, 2010 (designated as

[15] In a portion of a conversation recorded by EPCJ on May 10, 2011 (designated as part of State's issue 3E, but omitted from the Eighth Court's opinion), Villegas also recalled being angry at Rangel for talking to police and appeared to suggest that, understanding the seriousness of his situation, he would not have joked or bragged about the murders after his arrest. (CR22:7714–05/10/11 conversation (210453933591563) at 25:04–27:07, 28:16–28:21).

State's issue 9C),[16] when Mimbela related to Villegas a conversation he had with the probation officer who had facilitated the improper contact with Judge Bramblett, wherein the probation officer related that Villegas's original trial counsel asked the probation officer how Villegas and his team managed to get Judge Bramblett off his case and opined that removing Judge Bramblett was the best thing that could have happened to Villegas, both Villegas and Mimbela laughed, and Villegas agreed with Mimbela's belief that Judge Bramblett "...already had her mind set on this...." (CR22:7722–05/03/10 conversation at 10:36–12:00); *Villegas*, 506 S.W.3d at 765-66.[17]

Attempted bribery of Ciela Fierro

While preparing for Villegas's retrial, the State received information that Mimbela, on Villegas's behalf, attempted to bribe Ciela Fierro, a prospective witness residing in Denver, Colorado, who provided a statement to police in 2014 that Mimbela attempted to bribe her by telling "...[her] that [she] will be paid for

[16] Contrary to the Eighth Court's assertion, Judge Medrano–not Judge Ables–ruled on the admissibility of this recording. (RR8:27-29, 53-54, 60); (RR9:66-67, 69, 72).

[17] Although those portions of the recordings mentioning Judge Medrano were sealed by Judge Ables, (CR22:7788-89); (RR8:20), Villegas asserted that in two of the sealed recordings, specifically, the February 2 and April 5, 2011, recordings, Mimbela merely expressed "...his satisfaction that the case would be heard by an unbiased judge" and informed Villegas that Judge Medrano simply wanted truth and justice. *See* (Villegas's appellate brief at 143-44). This is not an entirely accurate characterization of what exactly was discussed in these recordings, but because these recordings are sealed, the State can only state that the recordings speak for themselves.

[her] statement" that Javier Flores had committed the murders. (CR22:7740-42); *see also* (CR19:6940-47–confirming that Mimbela visited Fierro in Colorado on Villegas's behalf).[18]

The "admissibility" hearing

After learning that the State intended to use the TDCJ and EPCJ recordings in its guilt-innocence case-in-chief at Villegas's retrial, the trial court, in an off-the-record, in-chambers, pretrial conference, indicated, in addition to its previously stated intent to require the State to designate the jail recordings it intended to use at trial, that it intended to require a pretrial demonstration by the State that the recordings are relevant, notwithstanding the State's objection that such an evidentiary showing was not the proper subject for litigation in a pretrial suppression motion. (CR21:7559); (RR3:6-10); (RR9:99-100). In a later motion for an *in camera* review of the recordings, Villegas urged suppression of the recordings as being irrelevant and unfairly prejudicial. (CR22:7706-08).[19] And at the hearing, Villegas, though not having previously pled or urged it as a basis for

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[18] Though not mentioned in the recordings at issue in this case, the State also has evidence showing that Mimbela placed another alleged alternative-perpetrator witness, Jamarcqueis "Jay" Graves, on his payroll. (CR14 at 5149-96); (CR22:7845).

[19] In response, the State filed the recordings under rule 902(10) of the Rules of Evidence and a memorandum to support its arguments that the recordings would be admissible at trial. (CR22:7710-42, 7726-42, 7746-49).

exclusion, sought pretrial exclusion of the recordings on the grounds of hearsay. (RR9:34-36, 44, 51, 58, 64, 71, 76-77, 94).

At the hearing, the trial court, indicating that it had listened to the designated recordings, looked to, and thereby placed the burden on, the State to demonstrate that the recordings are relevant–including that the recordings are not inadmissible hearsay–and not unfairly prejudicial. *See generally* (RR9:5-12, 18-20, 25-33, 36-48, 54-63, 67-70, 73-76, 78-83, 89-95). The State argued that the recordings were not subject to pretrial exclusion on the grounds urged by Villegas and that the interpretation of the recordings was a fact question for the jury, and not the trial judge, to decide at trial. (CR22:7726-42); (RR9:5-100). The State also offered to redact the recordings in a way that would not reveal that Villegas had been previously convicted. (RR9:15-18, 36).

The trial court, concluding that the recordings are irrelevant, inadmissible hearsay,[20] and unfairly prejudicial, determined that all but one of the recordings would be excluded at trial. (CR22:7833-35); (RR9:24-97). The trial court took under advisement a recording corroborating Villegas's failed bribery attempt of

[20] In his brief in the Eighth Court, Villegas noted that the State's issues presented to the Eighth Court mention only the trial court's relevance and rule 403 rulings, but not its hearsay rulings, which appear in the argument portion of the State's brief. *See* (Villegas's appellate brief at 49). The State's discussion on relevance encompasses the trial court's hearsay rulings because the trial court repeatedly ruled that the recordings are not relevant "...as they are hearsay." (RR9:24, 37, 46, 53, 66, 72, 94).

Fierro, wherein Villegas accused his then-girlfriend of being disloyal and not doing a "m***** f*****g" thing he told her, and when she retorted that he had not complained when she went to Denver on his behalf, when no one else wanted to, he asked her whether she was going to record their conversation and turn it over to the police. (CR22:7710, 7733-34); (RR9:57-58).

SUMMARY OF THE STATE'S ARGUMENTS

GROUND ONE: The Eighth Court erred in upholding the trial court's requirement that the State make a pretrial demonstration that recordings Villegas sought to exclude are relevant, not unfairly prejudicial, and not inadmissible hearsay where such fact-specific determinations requiring the context of trial evidence are not "preliminary matters" properly litigated in a pretrial motion, as such litigation would require the State to marshal and present its guilt-innocence evidence in a pretrial hearing. The Eighth Court further erred in holding that the trial court did not abuse its discretion in placing the burden upon the State, where Villegas, as the movant seeking the pretrial exclusion of evidence under several rules of evidence, bore the burden of demonstrating his entitlement to have evidence excluded before trial.

GROUND TWO: The Eighth Court misapplied the standard for reviewing relevance determinations when it: (1) held that the trial court did not abuse its discretion in excluding the State's evidence because, based on the trial court's personal evaluation of competing or available inferences, it was reasonable to reject the State's inferences, rather than determining whether a reasonable man could conclude that the State's proffered inference is one that is available from the evidence; (2) upheld the trial court's improper credibility or interpretative

assessments of the evidence, and (3) considered the relevance of the recordings in a piecemeal manner.

The Eighth Court further erred in upholding the trial court's relevance determination on the basis that the recordings are inadmissible hearsay and in upholding the trial court's premature rule 403 determination. Under a proper application of the standards, Villegas failed his burden of showing that the complained-of recordings are irrelevant, inadmissible hearsay, and unfairly prejudicial under rule 403.

ARGUMENT AND AUTHORITIES

GROUND FOR REVIEW ONE: The Eighth Court erred in holding that the trial court did not abuse its discretion in requiring, and placing the burden upon, the State to establish that jail-recorded telephone conversations Villegas seeks to exclude pretrial are: (1) relevant to an elemental or evidentiary fact of consequence to be litigated at trial, (2) not unfairly prejudicial under rule 403, and (3) not inadmissible hearsay, where such determinations necessarily require the ever-changing context of a trial and the party claiming the protection of exclusionary rules of evidence bears the burden of proving his case in a pretrial motion.

I. The Eighth Court erred in upholding the trial court's requirement that the State make a pretrial demonstration that recordings Villegas sought to exclude are relevant, not unfairly prejudicial, and not inadmissible hearsay.

In *Woods v. State*, this Court, in holding that it was improper to litigate the sufficiency of the evidence to support an element of the offense in a pretrial suppression hearing, explained that those "preliminary matters" properly addressed in a pretrial proceeding are only those "...issues that can be determined before there is a trial on the general issue of the case." 153 S.W.3d 413, 415 (Tex.Crim.App. 2005); *see also State v. Iduarte*, 268 S.W.3d 544, 551-52 (Tex.Crim.App. 2008).

And, relying partly on the reasoning in *Woods*, this Court recently held that a pretrial determination of mental retardation in a death-penalty prosecution was prohibited because "...the State would have to marshal 'all of its evidence' of the

defendant's guilt of the offense and his role in the offense in order for the factfinder to be able to assess how that evidence might weigh into resolving the issue." *Petetan v. State*, ---S.W.3d---, 2017 WL 2839870 at *45 (Tex.Crim.App., Mar. 8, 2017) (not yet reported), *quoting In re Allen*, 462 S.W.3d 47, 63 (Tex.Crim.App. 2015) (Alcala, J., dissenting); *see also In re Allen*, 462 S.W.3d at 58-59 (Yeary, J., concurring).

Thus, although a trial court may have the authority and discretion to conduct certain pretrial proceedings, including the admissibility of evidence, *Villegas*, 506 S.W.3d at 730, *citing State v. Hill*, 499 S.W.3d 853, 865-67 (Tex.Crim.App. 2016), TEX. CRIM. PROC. CODE art. 28.01, *Woods* and its progeny recognize that such discretion is not without limitation and may be abused, as the holdings in those cases are predicated on the basic premise that "preliminary matters" properly litigated pretrial are only those issues that can be resolved before there is a trial on the merits and do not require the State to marshal and present its guilt-innocence evidence. *See*, *e.g.*, *Petetan*, 2017 WL 2839870 at *45; *Iduarte*, 268 S.W.3d at 551-52; *Woods*, 153 S.W.3d at 415 (the statutes authorizing pretrial proceedings do not contemplate a mini-trial on the sufficiency of the evidence to support an

element of the offense, and the purpose of a pretrial motion is to address preliminary matters, not the merits of the case itself).[21]

The question, then, is whether a pretrial determination that complained-of evidence is relevant, not hearsay, and not unfairly prejudicial is a "preliminary matter" that can be properly litigated before there is a trial on the merits, in that it does not require the State to marshal and present its guilt-innocence evidence at a pretrial hearing.

"Relevancy is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a matter properly provable in the case." *Henley v. State*, 493 S.W.3d 77, 84 (Tex.Crim.App. 2016). A "fact of consequence" includes either an elemental fact or an evidentiary fact from which an elemental fact can be inferred. *Id*. at 84; *Montgomery v. State*, 810 S.W.2d 372, 387 (Tex.Crim.App. 1990) (op. on reh'g).

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[21] Despite Villegas's attempt to characterize it as such, the State's complaint does not simply attack the trial court's *decision to conduct a hearing* on the admissibility of the recordings. *See* (Villegas's appellate brief at 65-66). Rather, the State's issue is whether the trial court's *pretrial order excluding evidence* can be properly based on the State's alleged failure to make a pretrial demonstration that the complained-of evidence is relevant, not hearsay, and not unfairly prejudicial. But, even if the State's complaint could be characterized as Villegas contends, this Court has already addressed such an issue on a State's appeal. *Hill*, 499 S.W.3d at 864 (addressing, in a State's appeal, the issue of whether the "...trial court erred in holding a pretrial evidentiary hearing on [appellee's] motion to quash and dismiss").

Unlike specialized objections involving collateral legal issues with a finite set of facts (seizure of evidence, scientific reliability, etc.), addressing the issue of whether the recordings would tend to make the existence of any elemental or evidentiary fact of consequence in Villegas's retrial more or less probable, without a pre-existing context of what those unique facts of consequence or the contested issues will be, would require substantial evidentiary development beyond those "preliminary matters" that can be properly "...determined before there is a trial on the general issue of the case." *See* TEX. R. EVID. 401;[22] *Woods*, 153 S.W.3d at 415; *see also Petetan*, 2017 WL 2839870 at *45-46; *People v. Montoya*, 753 P.2d 729, 732 (Colo. 1988) ("...factors bearing on the admissibility of a particular item of evidence can best be evaluated in the context of the []evidentiary state of the record at trial rather than in the artificial atmosphere of a pretrial motion.[]"); *cf. State v. Mechler*, 153 S.W.3d 435, 442 (Tex.Crim.App. 2005) (Cochran, J., concurring) (emphasizing the difficulty of making individualized rule 403 determinations in a pretrial setting–evidentiary rulings that usually "...depend upon the precise evidentiary context of a particularized trial setting, taking into consideration the ebb and flow of trial testimony, the unique circumstances and

[22] Citations to the Rules of Evidence are generally to the current version, unless otherwise indicated, as the recent revisions were generally intended to be stylistic only. *Priester v. State*, 478 S.W.3d 826, 836 n.10 (Tex.App.–El Paso 2015, no pet.).

facts, and the specific contested issues"). In other words, requiring the State to show that the recordings tend to make the existence of an elemental or evidentiary fact of consequence more or less probable would require the State to marshal its evidence to show what it anticipates those elemental or evidentiary facts of consequences to be at trial–*i.e.*, not only the State's guilt-innocence case-in-chief, but also the defense case and evidence, if any, subject to rebuttal by the complained-of recordings.[23]

Additionally, courts, including this Court, have recognized that rule 403 objections are rarely appropriate for pretrial litigation, particularly because rule 403 is a trial-oriented rule. *Mechler*, 153 S.W.3d at 440; *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 859 (3rd Cir. 1990) (holding that rule 403 is a trial-

[23] The typical remedy when seeking to exclude evidence due to a lack of relevance would be an objection when the evidence is offered *at trial* or a pretrial motion *in limine* which, if granted, would require the proponent of evidence to make an initial evidentiary offer out of the jury's presence. *Norman v. State*, 523 S.W.2d 669, 671 (Tex.Crim.App. 1975). Contrary to the Eighth Court's assertion, there exists a significant difference between the wholesale and premature pretrial exclusion of evidence in criminal cases and an *in limine* ruling that defers the trial court's ruling to a time when it has sufficient context to make an informed decision. *Villegas*, 506 S.W.3d at 734. The harsh ramifications of a pretrial order excluding evidence in a criminal case, which could result in the wrongful dismissal of a prosecution because the State's case has been severely undermined, is one of the reasons why the Texas Legislature conferred upon the State the right to appeal such rulings, even though they are interlocutory in nature and may be reconsidered at any time. *See* HOUSE COMMITTEE ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 762, 70th Leg., R.S. (May 22, 1987) (explaining that the prohibition on State's appeals of erroneous pretrial evidentiary rulings constituted a serious problem in the proper administration of criminal justice because "[o]n occasion, defendants are released because of questionable legal rulings, excluding what may be legally admissible evidence...").

oriented rule, that pretrial exclusion of evidence under rule 403 is a rarely necessary extreme measure, and that precipitous rule 403 determinations, based on an underdeveloped record, are unfair and improper); *Commonwealth v. Hicks*, 91 A.3d 47, 53-54 (Pa. 2014) (opining that while some relevance determinations, such as relevance of extraneous-offense evidence, might be feasible pretrial, a rule 403 balancing inquiry is typically not because it "...is a fact- and context-specific one that is normally dependent on the evidence actually presented at trial"); *State v. Crumb*, 649 A.2d 879, 884 (N.J.Super.Ct.App.Div. 1994) (opining that, given the fluid and unpredictable nature of trial evidence, pretrial evidentiary motions should be granted only sparingly); *cf. Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 388, 128 S.Ct. 1140, 170 L.Ed.2d 1 (2008) ("[a]pplying Rule 403...requires a fact-intensive, context-specific inquiry.").

Addressing the issue of whether the recordings in this case are unfairly prejudicial under rule 403 would require substantial evidentiary development beyond what is proper for a pretrial hearing because it would require a balancing of multiple trial-context-based factors, such as: (1) the inherent probative force of the proffered item of evidence, along with (2) the proponent's need for that evidence, against (3) any tendency of the evidence to suggest decision on an improper basis, (4) any tendency of the evidence to confuse or distract the jury

from the main issues, (5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex.Crim.App. 2006); TEX. R. EVID. 403.

Although this Court in *Mechler* considered the question of whether a trial court abused its discretion in its pretrial exclusion of intoxilyzer results under rule 403, this Court expressly recognized that a trial court will oftentimes not have enough information before it to adequately apply the rule 403 balancing factors and assess whether the contested evidence's probative value is substantially outweighed by its prejudicial effects. *Mechler*, 153 S.W.3d at 440. In a concurring opinion, Judge Cochran explained that most of rule 403's work of balancing probative value against the risk of unfair prejudice or confusion of the issues is done during trial, not pretrial, and that rule 403 is rarely an appropriate basis for the pretrial exclusion of evidence because such rulings usually depend upon the "...precise evidentiary context..." of trial and the trial court cannot ascertain potential relevance or the impact of countervailing factors without a

"virtual surrogate for the record." *Mechler*, 153 S.W.3d at 442-43 (Cochran, J., concurring).

In this case, without the backdrop of the State's case-in-chief and defense evidence, the trial court is severely hampered in its ability to properly and adequately weigh the probative value of a particular recording and the State's need for that evidence against the tendency of the recording to suggest a verdict of guilt on an improper basis, confuse or distract the jury from the main issues, be given undue weight by the jury, as well as the likelihood that the presentation of the recording will consume an inordinate amount of time or be unnecessarily cumulative of other evidence.[24] For example, the more damaging a witness's trial testimony–that has yet to be presented–is to Villegas, especially if he has reason to believe said witness' testimony will be particularly damaging, the more probative to his consciousness of guilt are his attempts to conspire with Mimbela to influence that witness's testimony.

And, as will be discussed in greater detail below, to the extent that the Eighth Court deferred to the trial court's credibility assessments of competing or

[24] Villegas's repeated argument that the State cannot justify its need for the evidence under rule 403 because it has "scant" evidence" of his guilt, *see* (Villegas's appellate brief at 51, 55-56, 86, 91, 121, 125, 130, 134, 138, 141, 147), confirms the State's argument about the impropriety of conducting trial-context-based balancing inquiries pretrial because Villegas's arguments are predicated on the fact that the State did not present its retrial case-in-chief evidence at the pretrial hearing.

available inferences in rejecting the State's proffered inferences, it further erred, because, where such credibility determinations bear upon any number of evidentiary and elemental facts that relate to the ultimate issues in the case, the trial court's credibility assessments, under the guise of evidentiary rulings, would improperly usurp the jury's role as the exclusive factfinder on the ultimate issues in the case and deprive the State of its right to a jury trial by transforming a pretrial mechanism into a de facto bench trial. *Iduarte*, 268 S.W.3d at 552 (determination of whether a witness's testimony as to an element of an offense is credible is appropriately left to the factfinder at trial, not to a trial court at a pretrial hearing); *Montgomery*, 810 S.W.2d at 382 & 390 n.3 (a trial court may not weigh credibility in excluding evidence under rule 403).[25]

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[25] The Eighth Court suggested that the State's issue might not have been preserved because the State, in making a part of the appellate record its previous off-the-record, in-chambers objection to the trial court's decision to determine the admissibility of the recordings pretrial, did not "...object on the record to the hearing until *after* the trial court had already excluded all the evidence." *Villegas*, 506 S.W.3d at 730 n.6 (emphasis in original). It is apparent from the context of the statement made by the prosecutor that the State merely placed its previous off-the-record objection, timely made at the time the trial court first raised the issue of admissibility in chambers, on the record for purposes of including said off-the-record objection for the appellate record, and neither the trial court nor Villegas's defense counsel disagreed with the assertion that the State had made this off-the-record objection. *Thieleman v. State*, 187 S.W.3d 455, 458 (Tex.Crim.App. 2005). The trial court nevertheless persisted in its requirement that the State demonstrate the relevance and prejudicial effect of the recordings at the pretrial hearing. The State also argued at the hearing that the interpretation of the recordings was a fact question for the jury to decide *at trial*. (RR9:50-52, 65-66). And the sealed document to which the State directed the Eighth Court as further corroboration of this off-the-record objection was not a reporter's record, *Villegas*, 506 S.W.3d at 730 n.6, but an uncontested footnote in its second motion to recuse Judge Medrano that also noted this previous off-the-record objection.

Acknowledging that "...*Mechler* contemplates that there may be situations in which a trial court cannot conduct a pretrial Rule 403 balancing test because it does not have enough information before it," the Eighth Court nevertheless opined that the record was sufficiently developed for pretrial litigation of relevance and unfair prejudice because a "virtual surrogate for the record" is not required and because the trial court had "three virtual surrogates" from the record of Villegas's prior trials, over which Judge Medrano did not preside, and Villegas's habeas proceedings. *Villegas*, 506 S.W.3d at 731.

But, with limited exceptions, the State is generally not allowed to simply admit transcripts of former testimony from other proceedings to prove its case, such that it will have to rebuild its case. And there is no way for the trial court to know what different and/or additional evidence the State intends to present at this retrial, unless the State puts on its case-in-chief at a pretrial hearing. Similarly, the trial court cannot know what evidence, if any, the defense will present, particularly in light of the compromised witnesses' ever-changing stories, such that the possible relevance and probative value of the evidence for rebuttal purposes cannot be gauged at this premature stage. The Eighth Court's acknowledgment that "[f]urther development of the record at trial may furnish missing predicates, fill in inferential gaps, or render otherwise inadmissible evidence relevant or

admissible for another purpose," *Villegas*, 506 S.W.3d at 767, further confirms that a complete picture of admissibility may not develop until trial.

Additionally, the evidence at Villegas's habeas proceedings was limited to his ineffective-assistance-of-counsel and actual-innocence claims, and, for purposes of his actual-innocence claim, the comparison of alleged newly discovered evidence by Villegas, who alone bore the burden of proving his writ allegations by a preponderance of the evidence, to evidence presented at his second trial, did not require the State to present *any* evidence, much less evidence establishing his guilt beyond a reasonable doubt. *Ex parte Navarijo*, 433 S.W.3d 558, 566-67 (Tex.Crim.App. 2014) (reviewing court weighs new evidence against evidence of guilt presented at defendant's previous trial for actual-innocence claims); *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex.Crim.App. 2002) (habeas applicant bears the burden of proving, by a preponderance of the evidence, the facts entitling him to relief).

Moreover, Villegas, in seeking to preempt the State from using any testimony from his second trial, has taken the position that the previous trial testimony is not complete or accurate because it was not subjected to sufficient adversarial testing due to ineffective assistance of counsel. (RR9:111-14). And Villegas will presumably raise new alternative-perpetrator evidence at trial, which

will include entirely new evidence from both parties that was not presented at any of his previous trials. Also, a number of potential witnesses, such as Arasally, Wayne, Juarez, and Fierro, who would constitute part of the State's new evidence to rebut Villegas's alternative-perpetrator evidence, have never previously testified in *any* proceeding, such that the trial court does not know what their testimony will be–unless they testify at the pretrial hearing.[26]

Further, though arguing that the trial court had sufficient context to exclude the recordings pretrial because the trial court "...listened to the recordings in their totality," Villegas, characterizing the recordings at issue in this appeal as constituting "hundreds of hours," argued, and the Eighth Court seemingly agreed, that determining relevance and unfair prejudice at trial would require the trial court to "...recess for days or weeks...to listen to..." the recordings and "...force Villegas's counsel to request mid-trial breaks of days or weeks" to sift through "hundreds of hours of recordings" for rebuttal evidence. *See* (Villegas's appellate brief at 70-71); *Villegas*, 506 S.W.3d at 730, 733-34. But the recordings here are primarily seconds or minutes in length, and, knowing what the State intends to use

[26] The Eighth Court's requirement that the State move for a continuance of the hearing and demonstrate how the retrial will involve different prosecution strategies and how new witness testimony will differ from Villegas's prior trials, *Villegas*, 506 S.W.3d at 732, is the very problem the State seeks to avoid in the first place – putting on its retrial guilt-innocence case-in-chief at a pretrial hearing.

in advance, Villegas need not wait until trial to begin gathering his rebuttal evidence.

For all the foregoing reasons, the Eighth Court erred in upholding the trial court's requirement that the State make a pretrial demonstration that recordings Villegas sought to exclude are relevant, not unfairly prejudicial, and not inadmissible hearsay.

II. The Eighth Court erred in holding that the trial court did not abuse its discretion in placing the burden upon the State to prove that evidence Villegas moved to exclude pretrial was not subject to exclusion under the Rules of Evidence.

Even if the trial court could properly determine whether the recordings are relevant, not hearsay, and not unfairly prejudicial in a pretrial proceeding, the Eighth Court erred when it seemingly accepted Villegas' sweeping assertion that, in a pretrial proceeding where the defendant is the movant seeking to exclude evidence, the State bears the same burden as it would at trial to "...fulfill all required evidentiary predicates and foundations." *See* (Villegas's appellate brief at 73-74); *Villegas*, 506 S.W.3d at 733 (opining that it was the State's burden "...to establish the necessary predicates for admissibility...").

A criminal defendant seeking the protection of an exclusionary rule of evidence (such as relevance, unfair prejudice, and the general hearsay

exclusionary rule) bears the burden of persuasion and production if he chooses to move for such relief in a pretrial motion. *State v. Robinson*, 334 S.W.3d 776, 778-79 (Tex.Crim.App. 2011) (the defendant, seeking pretrial exclusion of blood-test results, bears the burden of producing evidence showing statutory noncompliance before the burden shifts to the State to show compliance); *Pham v. State*, 175 S.W.3d 767, 772-73 (Tex.Crim.App. 2005); *Mattei v. State*, 455 S.W.2d 761, 766 (Tex.Crim.App. 1970) (burden of persuasion and of producing evidence in a suppression motion rests permanently on the moving party), *citing Rogers v. United States*, 330 F.2d 535, 542 (5th Cir. 1964); *see also Robinson*, 334 S.W.3d at 782 (Cochran, J., concurring) (opining that the State has the burden of establishing all required evidentiary predicates and foundations at trial but that, in a pretrial suppression motion, the movant opposing the use of the complained-of evidence bears the burden of establishing that the evidence should not be admitted).[27]

In its opinion, the Eighth Court stated that Villegas never technically moved to suppress the recordings and that it appeared that there was just simply an understanding that the trial court would rule on the admissibility of the recordings

[27] In preparing this brief, the undersigned noticed an error in its citation to *Robinson* and the accompanying parenthetical on page 12 of the State's PDR. The pinpoint cite, page 782, in that citation appears in Judge Cochran's concurring opinion. The undersigned has corrected the error and added a separate pinpoint citation and parenthetical for the majority holding.

pretrial. *Villegas*, 506 S.W.3d at 728. However, aside from the fact that it is not clear that the Legislature authorized a trial court to *sua sponte* raise general admissibility issues if the defendant does not actually seek the pretrial exclusion of evidence, *see generally* TEX. CRIM. PROC. CODE art. 28.01,[28] the record reflects that Villegas urged the exclusion of the recordings in his pretrial motion for an *in camera* review of the recordings, in which he argued that the recordings are inadmissible because they are irrelevant and unfairly prejudicial. (CR22:7706-08). And at the pretrial admissibility hearing, Villegas, though not having pled it as a basis for exclusion, further urged exclusion of the recordings on the grounds of hearsay. (RR9:34-36, 44, 51, 58, 64, 71, 76-77, 94). Because Villegas was the movant seeking the pretrial exclusion of the recordings under several rules of evidence, he bore the burden of proving his entitlement to his requested relief. *See*, *e.g.*, *Robinson*, 334 S.W.3d at 778-79; *Pham*, 175 S.W.3d at 772-73; *Mattei*, 455 S.W.2d at 766.

Relying on *State v. Esparza*, Villegas nevertheless attempts to distinguish the foregoing cases by arguing that if a defendant's pretrial motion to exclude evidence is based on the Rules of Evidence, as opposed to constitutional or

[28] Allowing a trial court to invoke exclusionary rules of evidence *sua sponte* is problematic because exclusion of certain evidence might be contrary to a defendant's ultimate trial strategy.

statutory violations, the State bears the burden of making a pretrial demonstration that the evidence the defendant seeks to exclude is not subject to exclusion. *See* (Villegas's appellate brief at 72-73). But those cases holding that the burden is initially on the defendant where the defendant moves to suppress evidence on the basis of a constitutional or statutory violation are predicated on the more basic premise that the burden of proof generally rests on the party moving for relief. *See*, *e.g.*, *Rogers*, 330 F.2d at 542; *Mattei*, 455 S.W.2d at 766.[29] This Court has explained that this basic premise, that the moving party shoulders the burden of proof, is simply reinforced with the presumption of proper police conduct in those instances where the suppression motion is based on an alleged constitutional violation. *Mattei*, 455 S.W.2d at 766.

In other words, there is no distinction in the defendant's burden of proof if his suppression motion, filed before the State has moved to admit the evidence at trial, is based on an alleged constitutional or statutory violation as opposed to the Rules of Evidence, except that, if his suppression motion is based on an alleged constitutional or statutory violation, he must also, in addition to generally

[29] Additionally, *Esparza* involved a question of scientific reliability, an isolated area in which the burden appears to have been specifically allocated to the proponent of that evidence, even if scientific reliability is challenged in a pretrial hearing. *State v. Esparza*, 413 S.W.3d 81, 86 (Tex.Crim.App. 2013); *Kelly v. State*, 824 S.W.2d 568, 573 (Tex.Crim.App. 1992).

shouldering the burden of proof, overcome the presumption of proper police conduct. *Mattei*, 455 S.W.2d at 766 (basic rule that the movant shoulder the burdens of persuasion and of producing evidence is reinforced by the presumption of proper police conduct). The State need not establish all required evidentiary predicates and foundations for the admission of evidence, as Villegas contends, until it moves for the admission of that evidence at trial, and the defendant objects. *Robinson*, 334 S.W.3d at 782 (Cochran, J., concurring).[30]

Beyond the recordings, Villegas put forth no evidence from which the trial court could properly conclude that he satisfied his burden of proving that the recordings are not relevant to any elemental or evidentiary fact in the case and that the recordings will be unfairly prejudicial at trial under a trial-context-based rule 403 balancing test, such that the trial court erred.[31] And in the end, Villegas would

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[30] This Court has not interpreted rule 403 to assign a burden to either party when evidence is offered at trial, explaining that rule 403 merely imposes a duty upon the trial court to conduct a balancing inquiry when the opponent objects to the evidence. *Montgomery*, 810 S.W.2d at 389. But if Villegas seeks to preemptively exclude evidence in advance of trial, he should be made to demonstrate his entitlement to his requested relief as any other movant.

[31] In a post-submission letter brief, Villegas further argued that pretrial litigation was necessary because the State's use of his admissions of guilt would have "...require[d] Villegas to respond with the many times he was recorded proclaiming his innocence." *See* (Villegas's letter brief filed in Eighth Court on August 15, 2016). Aside from the fact that Villegas' statement that he should not have been convicted on the quantum of proof presented at his retrial is hardly a proclamation of innocence, such proclamations, if they even exist at all, are self-serving hearsay and inadmissible when offered by the defendant. *Wood v. State*, 18 S.W.3d 642, 651 (Tex.Crim.App. 2000) (defendant's self-serving statements tending to absolve him of criminal responsibility are inadmissible hearsay).

not have been able to, and did not, satisfy his burden of proof for the very reasons stated above, in that such a showing would require the precise evidentiary context of a trial. *Mechler*, 153 S.W.3d at 442-43 (Cochran, J., concurring).

In sum, one potential consequence of sanctioning the type of irregular pretrial proceeding employed in this case is that, theoretically, a trial court that does not approve of the State's decision to prosecute a certain case, but lacks the authority to dismiss the case without the State's consent, *State v. Mungia*, 119 S.W.3d 814, 816 (Tex.Crim.App. 2003), could force a dismissal by simply imposing the unreasonable requirement that the State make a pretrial demonstration that each and every prospective witness and piece of evidence is relevant, not hearsay, not unfairly prejudicial, and not subject to exclusion on whatever other evidentiary bases are raised by the defendant (or improperly raised *sua sponte* by the trial court).[32] For all the foregoing reasons, the Eighth Court erred in holding that the trial court did not abuse its discretion in requiring, and

[32] That Villegas raised for the first time on appeal, and the Eighth Court considered as a basis for upholding the trial court's ruling, his complaint that the State failed to properly authenticate one of the discs containing the recordings, a theory of law *not* raised below, such that it was *not* a theory applicable to the case to sustain the trial court's ruling, *Villegas*, 506 S.W.3d at 734-35; *Esparza*, 413 S.W.3d at 87-89 (a trial court's suppression order cannot be upheld on a theory of law not raised in the trial court and for which the State had no notice), illustrates the underlying problem of this entire pretrial proceeding, which is that the State was required, in a pretrial proceeding, to *negate* any and all possible bases for exclusion that Villegas could conceivably raise at trial, even if Villegas did not request exclusion on that basis in the trial court.

placing the burden upon, the State, in a pretrial proceeding, to establish that the recordings that Villegas seeks to exclude will be relevant, not hearsay, and not unfairly prejudicial. And without the context of trial, the Eighth Court erred in concluding that the trial court properly excluded the recordings, including Villegas's admissions of guilt and statements from which an admission of guilt could be inferred, on grounds of relevance (to include hearsay) and rule 403.

<u>GROUND FOR REVIEW TWO</u>: The Eighth Court misapplied the standard for reviewing relevance determinations where its analysis for determining whether the trial court abused its discretion in *excluding* relevant evidence looked to whether, based on the trial court's personal evaluation of competing or available inferences, it is *reasonable to reject* the State's proffered inferences, when the proper standard looks to whether an appellate court can state with confidence that by no reasonable perception of common experience could it be determined that the proffered inference is one that is *reasonably available* from the evidence.

I. Standard of review for relevance determinations

In defining the scope of a trial court's discretion on relevance determinations, this Court has explained that, because such an analysis is not always "cut and dried," "is not exclusively a function of rule and logic," and cannot be "wholly objectified," a trial court's relevance determination is reviewed for an abuse of discretion, taking into consideration that "...a trial court must rely in large part upon its own observation and experience of the world, as exemplary of common observation and experience, and reason from there in deciding whether proffered evidence has 'any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Montgomery*, 810 S.W.2d at 391, *quoting* TEX. R. EVID. 401 (former version).

But this Court further explained that, notwithstanding this considerable discretion, a trial court's ruling is not unreviewable, and if a trial court abuses its

discretion in *admitting* evidence when an appellate court can confidently state that by no reasonable perception of common experience could it be concluded that the admitted evidence has *any* tendency to make a fact of consequence more or less probable, *Montgomery*, 810 S.W.2d at 391, then a trial court similarly abuses its discretion in *excluding* relevant evidence if an appellate court cannot confidently state that, by any reasonable perception of common experience, the proffered evidence has *no* tendency to make any elemental or evidentiary fact of consequence more or less probable.

A trial court's discretion diminishes substantially when excluding evidence because a trial court must find that the complained-of evidence has *no* tendency to prove any fact of consequence in the case:

> We have held that Rule 401 []does not raise a high standard.... We have also held that "evidence is irrelevant only when it has *no* tendency to prove [a consequential fact]," and that while Rule 401 gives "judges great freedom to admit evidence, [it] diminishes substantially their authority to exclude evidence as irrelevant."

Gibson v. Mayor & Council of Wilmington, 355 F.3d 215, 232 (3rd Cir. 2004) (internal quotation mark and citation omitted) (emphasis added), *quoting Spain v. Gallegos*, 26 F.3d 439, 452 (3rd Cir. 1994). This is consistent with the notion that the threshold for relevance is low – to be relevant, evidence need not by itself prove or disprove a particular fact, and it is sufficient if the evidence merely

provides a small nudge toward proving or disproving some fact of consequence. *Ex parte Smith*, 309 S.W.3d 53, 61 (Tex.Crim.App. 2010).

And "[i]f a particular trial court judge could determine that he, *personally*, does not find a logical connection between the proffered evidence and the fact in issue, he is bound to admit the evidence if he believes that a 'reasonable man' might conclude that the evidence is relevant." *Montgomery*, 810 S.W.2d at 382 (emphasis in original). In other words, could a reasonable man conclude that the State's proffered inference is one that is reasonably available from the evidence?

Such an inquiry, for purposes of both relevance and rule 403 analyses, does not permit credibility assessments by the trial court, such that a trial court may not reject the State's proffered inference merely because it finds a competing inference or interpretation to be more reasonable. *Montgomery*, 810 S.W.2d at 382, 390 n.3 ("[C]redibility is a question for the jury; to permit the judge to exclude evidence on the grounds that he thinks it incredible would be a remarkable innovation and may even be a violation of the right of trial by jury."), *quoting* Wright and Graham, FEDERAL PRACTICE AND PROCEDURE, § 5214, at 265-66 (1977).

Moreover, because, as discussed above, determinations of relevance are context-driven, and if "[r]elevancy is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a matter properly

provable in the case," *Henley*, 493 S.W.3d at 84, a trial court should consider all the circumstances upon which the proffered inference is offered and examine the relevance of the proffered evidence in relation to other evidence in the case.

II. The Eighth Court misapplied the standard for reviewing relevance determinations.

In this case, the Eighth Court misapplied the standard for reviewing relevance determinations, for both the relevance and rule 403 analyses, when it held that the trial court did not abuse its discretion in excluding the State's evidence because, based on the trial court's personal evaluation of competing or available inferences, it is reasonable to reject the State's inference, rather than determining whether a reasonable man could conclude that the State's proffered inference is one that is available from the evidence. And contrary to the Eighth Court's assertion, the trial court did in fact make improper credibility assessments in making its rulings, as will be discussed below. *Villegas*, 506 S.W.3d at 733. Additionally, the Eighth Court erred to the extent that it considered the relevance of the recordings in a piecemeal manner.

As the State argued in the trial court and the Eighth Court, the recordings designated in State's issues 2A through 2F are relevant because recordings containing Villegas's direct admissions of guilt or statements from which a jury

could infer an admission of guilt–which is highly probative of guilt–provide, at the very least, a small nudge toward proving evidentiary or elemental facts germane to the issue of Villegas's guilt, show Villegas's consciousness of guilt, and/or rebut Villegas's defensive theory that the State fabricated a transcription containing his statement that he is not innocent. (CR22:7737-38); (RR9:78-79, 81, 83-84, 88, 91-93); (State's appellate brief at 73-85); *Zuliani v. State*, 903 S.W.2d 812, 824 (Tex.App.–Austin 1995, pet. ref'd) (a confession is the most probative and damaging evidence against a defendant), *citing Arizona v. Fulminante*, 499 U.S. 279, 292, 111 S.Ct. 1246, 1255, 113 L.Ed.2d 302 (1991).[33]

As to the October 12, 2011, conversation, the Eighth Court erred, not only in characterizing the State's transcription as "self-made," when it was prepared by a certified court reporter, but also in deferring to the trial court's credibility assessment and resolution of conflicting transcripts–a disputed fact issue for the factfinder at trial. *Montgomery*, 810 S.W.2d at 382, 390 n.3. The Eighth Court further erred in failing to consider the relevance of this recording in light of other recordings containing Villegas's attempts to explain what he meant by stating that

[33] For brevity's sake, the State will generally group the recordings into the following overarching categories: (1) admissions of guilt, (2) attempts to tamper with witnesses and/or suppress or fabricate evidence, (3) statements indicating a pact between Villegas and his cohorts to protect each other, (4) statements rebutting Villegas's alternative-perpetrator defense and defensive theory that he was joking when he confessed to Rangel, and (5) efforts to tamper with judicial officers.

he was not innocent, which made it more likely than not that Villegas made the inculpatory statement.

The recordings designated in State's issues 3A through 3F, 4A through 4E, 5A through 5G, 6A through 6C, 7B and 7C, and 9A through 9C are relevant because evidence that Villegas and Mimbela conspired to improperly influence Judge Bramblett, in *ex parte* communications, to grant him a new trial or an actual-innocence finding on a basis outside the confines of the law–thus forcing her to recuse herself–and also conspired to confer financial benefits on *seven* witnesses in an attempt to influence their testimony, manufacture favorable evidence, or suppress unfavorable evidence is evidence from which a jury could reasonably infer consciousness of guilt.[34] (CR22:7727-36); (RR9:5-32, 36-43, 45-51, 59-63, 65, 67-72); *Villegas*, 506 S.W.3d at 749-52, 754-56, 757-61, 763-66; *Wilson v. State*, 7 S.W.3d 136, 141 (Tex.Crim.App. 1999) (attempts to tamper with a witness or otherwise induce a witness to alter potential testimony is evidence of consciousness of guilt); *Ransom v. State*, 920 S.W.2d 288, 299 (Tex.Crim.App. 1994) (criminal acts designed to reduce the likelihood of prosecution, conviction, or incarceration are admissible as showing consciousness of guilt); *Johnson v.*

[34] The evidence also shows that Villegas and Mimbela conspired to tamper with two additional witnesses, Fierro, who they unsuccessfully attempted to bribe, and Jamarcqueis Graves, who Mimbela also placed on his payroll. (CR14:5149-96); (CR22:7845).

State, 583 S.W.2d 399, 409 (Tex.Crim.App. 1979) (attempts to suppress or fabricate evidence are admissible against a defendant); *Navarro v. State*, 810 S.W.2d 432, 437 (Tex.App.–San Antonio 1991, pet. ref'd) (offense of tampering with a witness was complete when appellant offered, conferred, and agreed to confer a benefit (money) in a manner calculated to cause false testimony); *Torres v. State*, 794 S.W.2d 596, 598 (Tex.App.–Austin 1990, no pet.) (any conduct by the accused that indicates a consciousness of guilt is probative of guilt). And evidence that the defendant enlisted the assistance of a third party to tamper with witnesses is also admissible as consciousness of guilt. *Gonzalez v. State*, 117 S.W.3d 831, 842 (Tex.Crim.App. 2003); *Agbogwe v. State*, 414 S.W.3d 820, 835 (Tex.App.–Houston [14th Dist.] 2013, no pet.).

Statements in the recordings designated in State's issues 3E, 5A, 5B, 5E, and 8A through 8D, indicating that Villegas, understanding the severity of his situation, would not have joked or bragged about committing the murders after his arrest, that Villegas was angry at Rangel for turning him in, and that Villegas pursued a theory that Flores was the shooter, even though he does not believe that Flores was the shooter, are relevant because they rebut Villegas's defensive theory that he was joking when he confessed to Rangel and his alternative-perpetrator defense identifying Flores as the shooter. (CR22:7736); (RR9:6-14, 18, 22-23, 73-

77); *Villegas*, 506 S.W.3d at 761-62; *Resendiz v. State*, 112 S.W.3d 541, 547 (Tex.Crim.App. 2003) (evidence tending to rebut a defense theory is relevant and admissible).[35]

And Villegas's furious diatribe in the recording designated as State's issue 7A, in which he told his mother that he demanded that Williams fulfill his oath to him and in which he complained only about the two other people who were likely in the car with him during the shooting, Williams and Gonzalez, "...living it up..." in the free world, while he had been left behind to "rot" in prison, is evidence from which a jury could infer that Villegas was angry that, of the three of them that were involved in the shooting, he was the one who took the fall, such that Williams and Gonzalez owed him. (RR9:60-62); *Villegas*, 506 S.W.3d at 763; *cf. Dossett v. State*, 216 S.W.3d 7, 26 (Tex.App.–San Antonio 2006, pet. ref'd) (defendant's oral statements revealing his knowledge of non-public details about the crime scene were inculpatory admissions that were probative of defendant's guilt).

The Eighth Court nevertheless determined that a number of the recordings are not relevant because it was reasonable for the trial court, based on its personal

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[35] The Eighth Court did not address the State's assertion that statements indicating that Villegas does not believe that Flores was the shooter are relevant to rebut his alternative-perpetrator defense. *Villegas*, 506 S.W.3d at 756-59.

evaluation of competing or available inferences, to reject the State's proffered inference in favor of Villegas's competing inferences and interpretations of the recordings. *Villegas*, 506 S.W.3d at 741, 753-54, 756, 759, 761-64, 766-67. But again, the proper standard looks only to whether a reasonable man could conclude that the State's proffered inference is one that is available from the evidence.

And a reasonable man could most certainly infer consciousness of guilt from recordings detailing the concerted efforts of Villegas and Mimbela to improperly influence judicial officers, to manufacture favorable evidence and suppress unfavorable evidence, and to improperly influence no less than *seven* witnesses in Villegas's case, including witnesses with whom Villegas's and Mimbela's *only* association is those individuals' status as witnesses in this case. *Wilson*, 7 S.W.3d at 141 (appellant's references to the witness's father and new baby could reasonably have been interpreted as a veiled attempt to influence the witness's testimony, and such attempt to tamper with a witness was evidence of consciousness of guilt); *Johnson v. State*, 263 S.W.3d 405, 426 (Tex.App.–Waco 2008, pet. ref'd) (evidence that defendant directed a friend to get a recantation from the complaining witness and an eyewitness statement identifying another

person as the perpetrator and providing the defendant an alibi was probative of appellant's consciousness of guilt).[36]

From conversations in which Villegas expressed satisfaction and amusement that a judge he believed would not have ruled in his favor was removed from his case, as a result of his own improper conduct, is evidence from which a reasonable man could infer that Villegas is not interested in obtaining a favorable ruling in accordance with the law and the facts, but based on some other improper purpose, such that the evidence is relevant to show Villegas's consciousness of guilt.

For all the foregoing reasons, the Eighth Court erred in holding that the trial court did not abuse its discretion in excluding the recordings as irrelevant.

III. The Eighth Court erred in upholding the trial court's relevance determination on the basis that the recordings are inadmissible hearsay.

The Eighth Court further determined that the relevance of the recordings is undermined by the trial court's proper exclusion of statements made by individuals other than Villegas on hearsay grounds, such that the remaining statements by

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[36] Regarding any argument that Villegas's and Mimbela's attempts to induce witnesses to change their testimony were not improper or unlawful because their actions were motivated by a desire to secure an acquittal for an allegedly innocent man, such motive cannot excuse their wrongful conduct and does not negate their intent to engage in their wrongdoing. *Mays v. State*, 318 S.W.3d 368, 380-81 (Tex.Crim.App. 2010) (defendant's mental-illness evidence demonstrated *motive* for killing the victims, but did not negate his *intent*).

Villegas lack sufficient context to be relevant. *Villegas*, 506 S.W.3d at 744-48. Villegas' own statements, as statements by a party-opponent, are clearly not hearsay. (RR9:84); TEX. R. EVID. 801(e)(2)(A) (providing that a statement by a party-opponent is not hearsay if offered against an opposing party and was made by the party in an individual or representative capacity).

And although the Eighth Court determined that the State waived the argument that statements by Mimbela, Villegas's family members and friends, or other speakers are not hearsay because those statements are not being offered for their truth because the State allegedly failed to raise that argument in the trial court, *Villegas*, 506 S.W.3d at 744 n.10, the prosecutor, when asked at the admissibility hearing why statements/questions by other individuals to the conversation, such as Villegas's mother, are not hearsay, argued that they "...have no truth value," (RR9:98), which was sufficient to apprise the trial court, who specifically asked about it, that statements by other speakers on the recordings were not being offered for their truth. *Berry v. State*, 233 S.W.3d 847, 857 (Tex.Crim.App. 2007) (objection or argument need only be sufficiently specific to apprise the trial court of the issue); *cf. Marroquin v. State*, 112 S.W.3d 295, 303 (Tex.App.–El Paso 2003, no pet.) (reviewing court should consider an argument if

it is so "inextricably entwined" with the issue specified in the point of error that "one cannot be mentioned without automatically directing attention to the other").

Regardless of whether the things discussed on the recordings actually came to fruition, the conversations in which Villegas engaged, all of which were offered only as non-hearsay (rather than as hearsay falling under a hearsay exception) at the hearing, are not hearsay because they are only being offered to show his consciousness of guilt, particularly his willingness to engage in such conspiratory activities. *Johnson v. State*, 425 S.W.3d 344, 346 (Tex.App.–Houston [1st Dist.] 2011, pet. ref'd) (affidavit of non-prosecution, offered to show that appellant's nieces had offered the complainant money to drop the charges and sign a non-prosecution affidavit, was not offered for the truth of its contents, but to show that appellant attempted to induce the complainant not to testify, such that the affidavit was not hearsay). And some of the statements by other speakers do nothing more than provide necessary context for Villegas's responses. *Kirk v. State*, 199 S.W.3d 467, 479 (Tex.App.–Fort Worth 2006, pet. ref'd) (statements/questions made by detectives when taking defendant's statement were not hearsay because they were not offered to prove the truth of the matter asserted and were admitted only to provide context to defendant's replies, since it would have been difficult to redact

the entirety of the detective's statements and have defendant's statements still make sense to the jury).[37]

The Eighth Court also erred in holding that statements made by Mimbela or Villegas's family members are not admissible under the adoptive-admissions exemption to the general hearsay exclusionary rule. *Villegas*, 506 S.W.3d at 745-46. And the Eighth Court further erred in holding that Mimbela's statements are not admissible under the statements-by-agent and statements-by-co-conspirator hearsay exemptions. *Id*. at 746-47; (RR9:13, 19-23). Rule 801(e) provides that a statement is not hearsay if it is offered against an opposing party, and the statement: (1) was one the party manifested that it adopted or believed to be true, *see* TEX. R. EVID. 801(e)(2)(B), (2) was made by the party's agent on a matter within the scope of that relationship and while it existed, *see* TEX. R. EVID. 801(e)(2)(D), or (3) was made by the party's co-conspirator during and in furtherance of the conspiracy. *See* TEX. R. EVID. 801(e)(2)(E).

In this case, a number of statements made by Mimbela and other speakers such as Villegas's mother are admissible as adoptive admissions because Villegas

[37] And while the Eighth Court determined that the State failed to address the admissibility of double and triple hearsay in its brief, *Villegas*, 506 S.W.3d at 747-48, if no part of a declarant's statement is being offered for its truth, such that statements contained within that declarant's statement is similarly not being offered for its truth, there is no double- or triple-hearsay issue to address.

either agreed with most of the statements, manifesting his adoption or belief in the truth of those statements, or he remained silent under circumstances in which a person would dispute the statements if they were not true. *Paredes v. State*, 129 S.W.3d 530, 534 (Tex.Crim.App. 2004) (recognizing silence, under circumstances in which a defendant would dispute a statement if it were not true, as an adoptive admission). And contrary to the Eighth Court's assertion, Villegas did not always simply respond "generally with 'yes' or 'yeah,'" *Villegas*, 506 S.W.3d at 745, but actively participated in these conversations, responded emphatically with statements such as, "Hell, yeah," and frequently laughed in satisfaction at Mimbela's efforts on his behalf.

Moreover, rejecting the State's argument that, in determining whether a declarant is an agent of the defendant for purposes of the rule 801(e)(2)(D) statements-by-agents hearsay exemption, it follow the test set out by this Court in *Wilkerson* for determining whether a non-law-enforcement state agent is acting as an agent for law enforcement, *Wilkerson v. State*, 173 S.W.3d 521, 530-31 (Tex.Crim.App. 2012), the Eighth Court agreed with Villegas that the appropriate test for determining whether a declarant is an agent of the defendant is that set out in civil cases, that is, whether the purported principal exercised actual control over

the agent, and held that the State failed to present evidence of the "...duties of the agent and character of his representation." *Villegas*, 506 S.W.3d at 746.

In *Wilkerson*, this Court, articulating a test for determining whether non-law-enforcement state agents are acting as an agent for law enforcement, explained that a reviewing court should look to whether the actions by the potential agent were conducted on behalf of the principal for the primary purpose of benefitting the principal. 173 S.W.3d at 530-31.[38] Put another way, is the potential agent working as an "instrumentality" or "conduit" for the principal? *Id*. Most simply, is the potential agent "in cahoots" with the defendant-principal? *Id*.

Statements made by an individual acting on a criminal defendant's behalf have been found admissible under the statements-by-agents hearsay exemption under reasoning similar to that in *Wilkerson*. *Dorsey v. State*, 802 N.E.2d 991, 994-95 (Ind.Ct.App. 2004) (conversation contained on jail recording between an unidentified male and witness, which defendant later joined, in which the unidentified male asked the witness, who defendant had already asked to lie for him, to be at the courthouse the next morning for her deposition and to look for the defendant, was admissible under the statement-by-agent hearsay exemption

[38] Generally, the law does not presume an agency relationship, and the party alleging such a relationship has the burden of proving that it exists. *Elizondo v. State*, 382 S.W.3d 389, 395 (Tex.Crim.App. 2012).

because the unidentified male was acting on behalf of the defendant). Inherent in such a test is the recognition that criminals do not generally enter into formal agreements that expressly set out the "...duties of the agent and character of his representation..." or the parameters of their criminal enterprise. And if Villegas and Mimbela were co-conspirators to the offense of tampering, as will be discussed, then they were necessarily agents of each other in their conspiracy. *See Byrd v. State*, 187 S.W.3d 436, 440 (Tex.Crim.App. 2005) ("[T]he underlying concept [of the co-conspirator hearsay exemption is] that a conspiracy is a common undertaking where the conspirators are all agents of each other and where the acts and statements of one can be attributed to all.").

In this case, Mimbela clearly performed certain actions on Villegas's behalf, and the only person to benefit from Mimbela's actions is Villegas. Villegas, as the sole beneficiary, had the authority to repudiate Mimbela's actions, but chose not to, and instead provided Mimbela with guidance and information on how Mimbela could best assist him. Simply, Mimbela and Villegas were most assuredly "in cahoots" with one another. And even if Villegas did not have prior knowledge of Mimbela's actions, Mimbela's actions became attributable to Villegas once he, after learning of Mimbela's actions on his behalf, ratified such actions and reaped

the benefits therefrom.[39] In light of that relationship, Mimbela's statements became those of Villegas and are thus admissible under rule 801(e)(2)(D). (RR9:19); *Wilkerson*, 173 S.W.3d at 530-31; *Dorsey*, 802 N.E.2d at 994-95.[40]

Further, the Eighth Court erred in holding that Mimbela's statements are not admissible under the co-conspirator hearsay exemption because there existed no independent evidence establishing the existence of the conspiracy to tamper with witnesses, *Villegas*, 506 S.W.3d at 747, because unlike those situations in which the State seeks to use *only* a co-conspirator's statement to establish the existence of a conspiracy, the evidence in this case are recordings that contain Villegas's own non-hearsay statements regarding facts underlying the conspiracy, as well as Fierro's statement that Mimbela offered her a bribe, on Villegas's behalf, to testify falsely in this case. *United States v. Lopez*, 758 F.2d 1517, 1520 (11th Cir. 1985) (defendant's own statements, which are not hearsay, constitute independent evidence establishing the existence of a conspiracy for purposes of the co-

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[39] Even if an alleged agent is not initially authorized to act on behalf of a principal, that agent's actions may be attributed to the principal if the principal later ratifies the agent's conduct. *Lozada v. Farrall & Blackwell Agency, Inc.*, 323 S.W.3d 278, 282 (Tex.App.–El Paso 2010, no pet.). Ratification occurs when a principal supports, accepts, or follows through on the efforts of a purported agent. *Id*.

[40] The State's argument that, to the extent that establishing the existence of an agency relationship would require fact-specific evidentiary development, such issue is not properly litigated pretrial, found in another section of its brief, is not a concession of any kind, but merely an alternative argument.

conspirator hearsay exemption); *Montoya*, 753 P.2d at 736 (evidence corroborating the existence of a conspiracy for the co-conspirator hearsay exemption includes: (1) circumstantial evidence of the conspiracy, (2) the co-conspirator's in-court testimony, *or* (3) the defendant's own statements); TEX. R. EVID. 801(e)(2)(E).[41]

As demonstrated by the statements in the recordings, including a written statement reflecting that Mimbela offered Fierro a bribe in exchange for false testimony, Villegas and Mimbela conspired to tamper with witnesses, and almost all of Mimbela's statements were made during the course and in furtherance of this conspiracy, such that Mimbela's statements are admissible as statements by a co-conspirator. *See* TEX. PENAL CODE § 36.05 (providing that a person commits the offense of tampering with a witness if, with the intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding to, among other things, testify falsely or withhold any

[41] The State's argument that, to the extent that establishing the existence of a conspiracy would require fact-specific evidentiary development, such issue is not properly litigated pretrial, found in another section of its brief, is not a concession of any kind, but merely an alternative argument. *Montoya*, 753 P.2d at 732-33 (because the "...fact-specific nature of issues relating to admissibility can best be resolved in the context of the actual state of the record at the time the challenged evidence is offered," a court's ruling on the admissibility of a co-conspirator's statement under the co-conspirator hearsay exemption should be made during the presentation of the State's case-in-chief at trial).

testimony, information, document, or thing); *Lopez*, 758 F.2d at 1520; *Montoya*, 753 P.2d at 736.

IV. The Eighth Court erred in upholding the trial court's premature rule 403 ruling.

As the State argued, a proper rule 403 balancing inquiry is premature at this stage because the record is not sufficiently developed for the trial court to apply the trial-context-based factors and accurately gauge the probative value and prejudicial effect of the recordings in relation to other trial evidence. But even if such an inquiry is appropriate at this time, Villegas failed his burden of proving that he is entitled to exclude the recordings pretrial under rule 403.

As previously discussed, Villegas's admissions of guilt, or statements from which guilt may be inferred, and his attempts to tamper with witnesses and judicial officers, which reflect consciousness of guilt, are highly probative of his guilt. And because the trial court suppressed his confession, and Villegas has engaged in a conspiracy to compromise all the witnesses who might testify to inculpatory facts, the State's need for the evidence is great. Additionally, because the recordings are germane to the question of guilt (and consciousness of guilt) for the offense charged in this case, any tendency to suggest decision on an improper basis, to confuse or distract the jury, or to be given undue weight by the jury is

diminished. Moreover, to the extent that the trial court found the recordings unfairly prejudicial based on its own credibility and personal interpretative assessments, it erred, as such assessments are improper in a rule 403 analysis. *Montgomery*, 810 S.W.2d at 382.

The Eighth Court nevertheless held that some of the recordings were unfairly prejudicial under rule 403 because placing the recordings in context would require an explanation of the habeas proceedings, "...necessarily risk[ing] exposing the jury to the highly prejudicial fact that Villegas had been found guilty and was incarcerated for the same crime." *Villegas*, 506 S.W.3d at 739-40, 766-67.

As to those recordings, the State offered to redact the recordings in such a way as to minimize any such risk. (RR9:15-18). While it is generally not permissible to admit evidence revealing to the jury that the defendant had been previously convicted of the charged offense by another jury in a former trial, *see* TEX. R. APP. P. 21.9, such rule only applies to a "finding or verdict of guilt in the former trial" and not to mere references to a former trial. *Barfield v. State*, 464 S.W.3d 67, 75-76 (Tex.App.–Houston [14th Dist.] 2015, pet. ref'd). And the trial court may employ measures to ameliorate any danger of unfair prejudice by

carefully instructing the jury that it may not use the fact of Villegas's prior conviction and incarceration as a circumstance of guilt against him.[42]

Conclusion

The State, as the representative of the people of the State of Texas in criminal cases, must take issue with requirements that impose unreasonable burdens on the State that unjustifiably inure to the defendant's benefit and circumvent prohibitions intended to prevent a trial court (or a defendant) from unreasonably interfering with the State's lawful prosecution of the defendant. It is doubtful that the Legislature intended to permit proceedings that require the State to make a pretrial demonstration that: (1) voluminous pieces of evidence, whether they be recordings, witness testimony, or other physical evidence, make some evidentiary or elemental fact of consequence at trial more or less probable, thus requiring a pretrial demonstration of what the State anticipates those evidentiary and elemental facts to be, (2) each portion of a proffered statement or conversation involving multiple speakers about varying subjects fits squarely within a hearsay exemption or exception in that: (a) it is not offered for its truth, even if it is not immediately apparent pretrial what exactly the statement, and the portions thereof,

[42] In any case, Villegas can hardly complain that using this evidence against him is unfair if he chose to engage in his misconduct while in prison, using the prison phone system.

will be offered for at trial, (b) it fits within a hearsay exemption or exception, which may involve fact-specific, context-based inquiries, (3) the evidence is not unfairly prejudicial under rule 403 under a trial-context-based balancing inquiry of numerous factors, which balances: (a) the probative value of the evidence–again, the evidence's ability to make some evidentiary or elemental fact of consequence at trial more or less probable, (b) the State's need for the evidence, based on an evaluation of the strength of the State's case on something other than the defendant's bare, unsubstantiated, and self-serving assertions that the State cannot justify that it needs the evidence because it has no evidence, and (c) whether the evidence will be cumulative of other evidence not yet presented at a trial, and (4) the evidence is not subject to exclusion on any other basis raised by the defense or improperly raised *sua sponte* by the trial court.

In this case, Villegas cannot demonstrate any harm that would result from simply waiting until the evidence is offered at trial, outside the presence of the jury if need be, *see* TEX. R. EVID. 104, with the benefit of full context, such that the trial court can make a fully informed decision about the foundation for admitting that evidence. Contrary to Villegas's assertions, the recordings the State seeks to offer are not "hundreds of hours" long, but last only minutes or seconds, the trial court has apparently already listened to all of the recordings, and Villegas

cannot justify pretrial exclusion on the grounds that he would be required to sift through "hundreds of hours" searching for elusive proclamations of innocence to rebut his inculpatory statements because such statements are inadmissible self-serving hearsay when offered by a defendant. That litigation of these issues produced two "overlong" briefs, *see* (Villegas's appellate brief at 1), and a nearly 70-page opinion that hardly discussed any *trial* evidence from Villegas's retrial simply illustrates why what the trial court did in this case was untenable.

For all the foregoing reasons, the Eighth Court erred in holding that the trial court did not abuse its discretion in requiring, and placing the burden upon, the State to make such a substantial evidentiary demonstration in a pretrial hearing, and, in the alternative, the Eighth Court further erred in misapplying the standard for relevance determinations and ultimately concluding that the recordings are irrelevant, because they lack probative value and constitute inadmissible hearsay, and are unfairly prejudicial under rule 403.

PRAYER

WHEREFORE, the State prays that this Court reverse the judgment of the Eighth Court and remand the case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document contains 14,619 words.

/s/ Lily Stroud
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CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on July 6, 2017, a copy of the foregoing brief on the State's petition for discretionary review was sent by email, through an electronic-filing-service provider, to appellee's attorneys: Joe A. Spencer, Jr., joe@joespencerlaw.com; and John P. Mobbs, johnmobbs@gmail.com.

(2) The undersigned also does hereby certify that on July 6, 2017, a copy of the foregoing brief on the State's petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

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